

Milwaukee Branch of the NAACP, et al.,

PLAINTIFFS,

vs.

Case No. 11 CV 5492

Scott Walker, et al.,

DEFENDANTS

ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION

This is an action seeking declaratory and injunctive relief seeking to preclude enforcement of that portion of 2011 Wisconsin Act 23 which requires Wisconsin electors to produce one of several specific forms of photo identification in order to receive an election ballot. This case is set for trial commencing April 16, 2012. Pending trial, the plaintiffs have moved for a temporary injunction. Both sides have submitted argument as to the applicable legal principles as well as evidence in the form of written affidavits. An evidentiary hearing was conducted March 1, 2012 in which the testimony of UW Political Science Professor Kenneth Mayer was presented on behalf of the plaintiffs.

The motion for temporary injunctive relief poses two issues before the court. The court must first determine whether the moving party demonstrated the probability of eventual success at trial. If there is such a showing, the court must then determine whether it is probable that the moving party will suffer irreparable harm if the court fails to render a temporary injunctive order, Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). For the reasons set forth below, the court concludes that the plaintiffs have demonstrated the probability of success as well as the likelihood of irreparable harm. The court therefore orders that the defendant cease enforcement of Act 23 as to any requirement of photo identification of voters pending further order of this court.

I. The Plaintiffs' Claims are Founded Exclusively Upon the Wisconsin Constitution

The plaintiffs have based this case exclusively upon the guarantees set forth in the Wisconsin Constitution.¹ They do not look to the U.S. Constitution as the basis for their claims. The Wisconsin Constitution sets out the basic framework of our state government. The right to vote is a fundamental, defining element of our society. The Wisconsin Supreme Court has described it as a "sacred right", Dells v. Kennedy, 49 Wis. 555, 6 N.W.246, 247 (1880), quoting Page v. Allen, 58 Pa. St. 346. It is a right which is explicitly and broadly guaranteed in the Constitution, in Article III, Suffrage.

Electors. Section 1.

Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.

The Wisconsin Supreme Court has often used the term "constitutionally qualified elector" to describe one eligible to vote in our state, e.g. Dells, supra, at p. 558. That is because the Constitution, not the legislature or any law enacted by the legislature, is source of the right to vote and, unlike the United States Constitution, the Wisconsin Constitution sets forth explicitly the requirement for eligibility to vote, Art I, Sec. 2 (4). The court must begin any consideration of voter eligibility legislation with the recognition of this bedrock constitutional foundation of Wisconsin voter eligibility.

The legal issue before this court what is permitted by the Wisconsin Constitution and that issue is not to be determined by what is permitted in other states. It does give one pause, however, to contemplate the possibility that with Act 23, Wisconsin now has the benefit and the burden of the single most restrictive voter eligibility law in the United States. That was the view offered in the testimony of Professor Mayer and it is consistent with appellate decisions considering voter identification law in Indiana, Missouri, Georgia and Michigan, Crawford v. Indiana, 663 U.S. 181 (2008), Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006), Democratic Party of Georgia, Inc. v. Perdue, 288 Ga. 720, 726, 707 S.E. 2d 67, (Ga. 2011), Request for Advisory Opinion, 479 Mich. 1, 740 N.W.2d 444, 456-457 (2007) .

¹ There are now before the court three claims. They are allege denial of the right to vote guaranteed in Article III, Section 1, denial of substantive due process and denial of equal protection, Article I, Section 1. The parties have agreed to withdraw from consideration in this action, a fourth claim which alleged that Act 23 improperly imposes voter qualifications beyond those specified in Article III, Section 2(4).

II The Demographic Evidence Offered by the Plaintiff is Competent, Adequate and Persuasive.

The plaintiff has offered the testimony of Professor Kenneth Mayer as well as two reports prepared by him, January 16, 2011 [sic], Exhibit 41, and February 5, 2012, Exhibit H. In his testimony and the reports Professor Mayer relies upon census data, a 2010 reference guide of the Wisconsin Department of Transportation and specific demographic reports from accepted sources, including a 2006 study by Professor John Pawasarat, Director of the Employment and Training Institute of the University of Wisconsin-Milwaukee, "Drivers License Status of Voting Age Population in Wisconsin". The Pawasarat study is particularly important in that it is the only extant study of Wisconsin voting age demographics based upon the access to the drivers license data bank of the Wisconsin Department of Transportation. The defense has questioned closely the adequacy and specificity of Professor Mayer's data but has not challenged the authenticity or the reliability of the sources of that data. The court concludes that the testimony offered by Professor Mayer is competent, well-founded, entirely credible and persuasive.

III. A significant proportion of constitutionally eligible voters in Wisconsin do not possess acceptable photo identification.

A majority of constitutionally eligible Wisconsin voters possess a valid drivers license. For them, the required presentation of that license at the poll poses no particular problem. A minority of eligible voters who do not possess a drivers license have obtained a photo identification card from the Wisconsin Department of Transportation (WisDOT). Professor Mayer offered evidence that as of 2002 there were some 221,975 constitutionally qualified voters in Wisconsin who do not possess a drivers license or a voter photo identification. That number is based upon the Pawasarat study reduced by exclusions for felony convictions and non-citizens residing, both legally and illegally, in Wisconsin.² There are other acceptable forms of voter identification but Professor Mayer offered the opinion that these would not significantly modify the resulting number of constitutionally qualified voters without a photo ID.³

² The Pawasarat study began with the Wisconsin census population for 2000 and then incorporated WisDOT drivers license data for 2002. Professor Pawasarat did not adjust for mortality between 2000 and 2002 but that adjustment was calculated by Professor Mayer to have been a minor factor. Moreover, the drivers license data reportedly does not account for mortality either. In any event, the essential question is the proportion of eligible voters with and without photo identification and any minor adjustment for mortality would apply to both groups.

³ A Passport is an acceptable form of photo identification as is a current student identification and Military identification. There are no available data as to the number of passports held by Wisconsin residents and Professor Mayer assumed that few passport holders would not also hold a drivers license.

Any effort to capture a demographic reality of the entire state will necessarily involve estimates and professional judgment. Professor Mayer testified that he began with the best available base data and made consistently conservative adjustments to produce a reliable measure of the number of voters, presently eligible under the Wisconsin Constitution who are to be turned away if they attempt to vote in the next election.⁴ The court concludes that number of such constitutionally qualified voters demonstrated by the work of Professor Mayer both a reliable measure and a legally significant proportion of the Wisconsin electorate.

IV. 2011 Wisconsin Act 23 Imposes a Substantial Burden upon Constitutionally Qualified Voters

An eligible voter who does not possess a drivers license may apply for a voter identification card from the WisDOT. It has been represented that there is no direct fee for this identification but that is at best a somewhat incomplete picture. The plaintiffs have submitted the affidavits of forty individuals each of whom describes the process of attempting to obtain the identification document. Nineteen people obtained a voter ID card only after paying between \$14 and \$39.50 to obtain a certified birth certificate from Wisconsin or elsewhere. This is a real cost that is imposed upon constitutionally eligible voters and was found to be an improper burden by the Missouri Supreme Court, Weinschenck, supra, at p. 209. A poll tax of \$1.50 upon otherwise eligible voters was deemed an unconstitutional impairment in Harper v. Virginia Board State of Elections, 383 U.S. 663 (1966).

The forty uncontested affidavits offer a picture of carousel visits to government offices, delay, dysfunctional computer systems, misinformation and significant investment of time to avoid being turned away at the ballot box. This is burdensome, all the more for the elderly and the disabled. This lawsuit is a facial challenge to the constitutionality of Act 23, and the court must focus upon the impact of the law across the entire state, rather than specific individuals. It is however, useful to consider actual difficulties experienced, given the number of eligible voters affected as well as the inflexibility of the Act 23, a matter to be discussed below.

Mr. Ricky Tyrone Lewis is 58 years old, a Marine Corps Veteran and a lifelong Milwaukee resident. He was able to offer proof of his honorable discharge but Milwaukee

Professor Mayer considered the number of voting age students and again determined there many likely possessed a drivers license. The number of military identification held by persons also lacking a drivers license was assumed, and reasonably so, to be of minimal statistical significance.

⁴ This appears to be a substantially more refined analysis than that which was available to the Court of Appeals in McNally v. Tollander, 97 Wis. 2d 583, 591 fn 4.

County has been unable to find the record of his birth so he cannot obtain a voter ID card. Ms. Ruthelle Frank, now 84, is a lifelong resident of Brokaw, Wisconsin and a member of her town board since 1996. She has voted in every election over the past 64 years but she does not have a voter ID card. She located her birth certificate but found that her name was mis-spelled. She was advised to obtain a certified copy of the incorrect birth certificate and try to use that to obtain a voter ID card.

V. There is No Evidence of Voter Fraud that would have been Prevented by Act 23

The plaintiffs do not dispute, and the court certainly accepts fully the value of maintaining the accuracy and security of the ballot process. At this point, however, the record is uncontested that recent investigations of vote irregularities, both in the City of Milwaukee and by the Attorney General have produced extremely little evidence of fraud and that which has been uncovered, improper use of absentee ballots and unqualified voters, would not have been prevented by the photo identification requirements of Act 23. Photo identification does offer assurance that the person standing at the poll is not actually another person. It does not assure that the person is qualified to vote. It does not preclude the person having also voted by absentee. Moreover, Professor Mayer testified that it is generally accepted within his field of study that fraudulent misrepresentation of voter identification is extremely unlikely because the felony penalty is severe and the potential benefit is extremely limited. This testimony is plausible, consistent with available evidence, un-contradicted and persuasive.

VI. The Act 23 Photo Identification Requirement is a Notably Inflexible Process

It is a salient feature of Act 23 that it does not mandate any sort of review or validation of the ballot of a constitutionally qualified voter who lacks the required photo identification. Under Act 23, a constitutionally qualified voter who cannot produce the required photo identification at the polling place, or within three days thereafter, is simply prohibited from voting. That is something very different and significantly more of an impairment than any mechanism whereby a provisional ballot might be held to the side for further validation. By sharp contrast, the Indiana voter identification law considered by the Supreme Court in Crawford, supra, a voter not able to produce the photo ID because of indigency or religious concerns, could cast a provisional vote which would be counted so long as the exception was affirmed by affidavit within ten days. The Supreme Court acknowledged that the Indiana law imposed a burden on certain groups but process did permit a degree of accommodation not available under Act 23. The Georgia voter identification law, upheld in Democratic Party of

Georgia, Inc. v. Perdue, 288 Ga. 720, 707 S.E. 2d 67 (2011), required photo identification but also permitted one to vote upon signing an affidavit affirming the voter's identity, at p. 720.

VII. Constitutionally Qualified Wisconsin Voters who do not Possess a Drivers License are Disproportionately Elderly, Indigent or Members of a Racial Minority.

The plaintiffs in this lawsuit do not contend that Act 23 is intentionally directed at the elderly, the indigent or members of racial minorities. Professor Mayer, however, offered uncontested testimony that the burdens created by Act 23 will necessarily fall more heavily upon these groups. The touchstone of the voter identification system is the drivers license. Statewide, 80 percent of men and 81 percent of women possess a valid Wisconsin drivers license. For minority members, the picture is substantially different, however. In Wisconsin, 45 percent of African-American males and 51 percent of females possess a license. As to Hispanics, 54 percent of males and 41 percent of females have a Wisconsin license. 23 percent of residents age 65 and older do not possess a drivers license, Pawasarat, Ex. D. As noted, obtaining a voter ID card can be tedious and is not really cost-free. This burden is certainly no less for qualified voters who are indigent or elderly.

VIII. The Court must carefully consider the Purpose, the Benefits and the Burdens of Act 23 in Light of the Wisconsin Constitution's Guarantee of the Right to Vote.

The parties dispute the extent to which this court may review the choice of the legislature to adopt Act 23. Essentially, the defendants argue that the court must give deference to the legislature's decision to adopt this law and indeed, it is true that a court does not hold authority to usurp the legislature's role and should be very cautious in undertaking any sort of review of an act of the legislature. This deferential approach is known as the rational basis standard of review. The plaintiffs, by contrast, look to past decisions of the Wisconsin Supreme Court to argue that the right to vote is so critical, so fundamental, that this court should examine carefully and closely the impairment that they claim the legislation is likely to have upon that exercise of that right.

A. The Wisconsin Supreme Court has not Deferred to the Legislature on Questions of Voter Qualification.

No court should hastily entertain a challenge to the constitutionality of any act of the Legislature and, indeed, every act of the legislature must be assumed to be consistent with the constitution. The burden lies with the party challenging a law to demonstrate clearly the basis for that challenge. It is also true, however, that the Wisconsin Supreme Court has consistently

acknowledged that the qualification for voting is guaranteed in the constitution and cannot be changed by statute or impaired by regulation. Whenever, there has been a challenge in an election case, particularly a challenge involving a voters actual access to vote at the poll, the court has always looked both to the purpose and benefits of the law but also to the impact of the law.

In 1864, the Legislature passed an Election Registry Law which created a system where officials were to prepare a list of qualified voters prior to an election. In State ex. Rel. Wood v. Baker, 38 Wis. 71 (1875), the court considered a challenge to an election result in which the officials in several wards had failed to prepare properly the registry list. It was uncontested that the officials had failed and the registry law required that the votes of otherwise qualified voters not be counted. The court acknowledged the proper purpose of the law but held that the voters' right to vote was protected by the constitution and ruled that the votes must be counted. A registry law was again in issue in Dells v. Kennedy, 49 Wis. 555 (1880). The plaintiff claimed that he was qualified to vote but had been turned away at the poll because he had not appeared to register prior to election day as required by an 1879 registry statute. The circuit court enforced the law but the Supreme Court reversed that decision, holding that the constitutional right to vote could not be impaired by the registry requirement. In Ollmann v. Kawalewski, 238 Wis. 574 (1941), certain Milwaukee County ballots had not been properly marked when received by election officials. Although applicable state election law required that such ballots not be counted the election officials did include them. The circuit court declined to exclude the ballots, in its decision the Supreme Court agreed that they should be counted. Beginning with the observation that, "Voting is a constitutional right, Art III, § 1, Const., and any statute that denies a qualified elector the right to vote is unconstitutional and void" the court refused to interpret the law to require exclusion of the votes. The point here is that the Wisconsin Supreme Court has examined closely and carefully challenges to voter statutes which have had the effect of impairing voter access.

The critical need to protect zealously voter access to the ballot was at the heart of the decision in McNally v. Tollander, 100 Wis.2d 490 (1981), involving an election held to determine the location of the Burnett County seat. Officials in eight of twenty-four towns refused to distribute ballots to voters thus excluding approximately forty percent of the qualified voters. The trial court declared the election void but the Court of Appeals reversed citing an 82 percent voter participation and the need to respect an election result. The Supreme Court, however, based its view of the fact that a significant minority of qualified voters had been denied the opportunity to vote and declared the election void.

The defendants suggest that this court should defer to the determination of the Legislature in this dispute and need not look closely at the possibility of impairment of the constitutional right to vote. The court does not find support for that suggestion in the most applicable Wisconsin Supreme Court decisions. It is true that the Court has deferred to legislative determinations in election matters not involving direct voter access, such as the introduction of the combined "Australian" ballot form, State ex. Rel. Van Alstine v. Frear, 142 Wis. 320 (1910) and the timing of an election, State ex Rel. Frederick v. Zimmerman, 254 Wis. 600 (1949). Even in such areas, however, the Supreme Court still looked to the constitution, not statutory law as the foundation for election process, refusing to interpret a statute to set qualifications for office, State ex Rel. Barber v. Circuit Court, 178 Wis. 468 (1922). Further, in upholding statutory election regulation, the court has considered both the benefits and burdens of regulation to be sure that there be the "freest opportunity practicable is given under the law for the voter" to cast a ballot, State ex rel. Runge v. Anderson, 100 Wis. 523, 76 N.W. 482, 485 (1898).

The court concludes that when the issue is whether a legislative enactment substantially impairs the constitutionally guaranteed right to vote, a court has the authority and the obligation at least to consider the actual impact rather than simply deferring to the stated purpose of the law.

B. The Proper Level of Judicial Review is Strict or Heightened Scrutiny

The right to vote has been characterized as "inherent, ... fundamental ... sacred", State ex Rel. McGrauel v. Phelps, 144 Wis. 1, 128 N.W. 1041, 1046. Where a statute implicates a fundamental interest, it is the obligation of a court to apply a strict or heightened level of review to the statute to determine it remains within that range of authority permitted under the constitution, In re Zachary B., 271 Wis.2d 51, 62 (2004). This means that the court must not only look to see if the law speaks to a legitimate purpose but must go further, as the Wisconsin Supreme Court has done in the past, to consider both the benefits and the burdens of the law. It means that when the law in question seeks to regulate a fundamental right, the burden then shifts to the government to justify the enactment.

Looking first to the purpose of the law, it is to protect the integrity of the election process and, as an abstract concept that surely is a proper and compelling governmental interest. It seeks, however, to regulate a most fundamental interest, the constitutionally guaranteed right to vote. The next question then, is to ask if it is narrowly tailored to serve that interest effectively without imposing a significant burden upon the opportunity to constitutionally qualified voters to gain access to the ballot. Or, as expressed by the Wisconsin Supreme Court, does this election law pass the test

that it "must be reasonable", State ex rel. Frederick, supra, at p. 614. Thus the court must consider not only the purpose of the law but also the possibility that it will impair the fundamental constitutional citizens to vote in Wisconsin. Such scrutiny is required by the significance of the interests involved.

IX. The Photo Identification Requirement of Act 23 has been shown to be an Improper Impairment of the Constitutional Right to Vote.

Act 23 is addressed to a problem which is very limited, if indeed extant. Seemingly it fails to account for the difficulty its demands impose upon indigent, elderly and disabled citizens who are qualified under the constitution to vote. It offers no flexibility, no alternative to prevent to exclusion of a constitutionally qualified voter. By contrast, the sweep and impact of the law is very broad. Given the sacred, fundamental interest in issue, it is very clear that Act 23, while arguably addressing a legitimate concern has not been sufficiently focused to avoid needless and significant impairment of the right to vote. The enactment steps beyond the proper authority of the legislature and is in violation of the Wisconsin Constitution, Article III, Section 1.

X. The Decision of the U S Supreme Court in Crawford v. Indiana does not Require Judicial Deference to Act 23

The defense submits that the court should be guided by the decision of the U. S. Supreme Court in Crawford v. Marion County Election Board, 553 U.S. 181 (2008) in which the court considered challenge to the Indiana voter ID law. The Crawford decision has very little application to the dispute now before this court, however, for three primary reasons. First, this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote while Crawford was based upon the U.S. Constitution which offers no such guarantee. Second, the Indiana law is less rigid than Act 23, and as noted by the U.S. Supreme Court, offered alternative voting opportunities to voters who lacked the photo ID. Finally, the Crawford case came to the court based upon a flawed factual record lacking the substantial evidence that has been offered by the plaintiffs in this action.

This case is a claim that Act 23 violates the Wisconsin Constitution, not the U. S. Constitution. The people of Wisconsin may choose to assure to themselves rights under their own constitution that differ or exceed those guaranteed under the U.S. Constitution, State v. Doe, 78 Wis. 2d 161, 172 (1977). The question of what is permitted and what is protected by the Wisconsin Constitution is the issue before this court and that issue was not before the U.S. Supreme Court in the Crawford case..

The Indiana voter ID law permitted one lacking a photo ID to cast a provisional ballot which will be counted if the voter files, within ten days, an affidavit stating that the voter is indigent or has a religious objection to being photographed. This available alternative was relied upon by the court in rendering its decision to mitigate the acknowledged impact of the law upon the elderly and indigent, Crawford, supra, at p. 199. By contrast, in Wisconsin may cast a provisional which is counted only if the voter shows in three days with the required photo ID.

Finally, the district court considering the record which became the basis of the Crawford decision, described the factual showing of the critics of the voter identification law as "utterly incredible and unreliable," Crawford, supra, at Indiana Democratic Party v. Rokita, 458 F.Supp. 2d 775, 803 (U.S.D.C. S.D. Ind. 2006). Here, as noted above, the showing by the plaintiffs has been substantial, entirely credible and uncontested. This is situation very different from that before the Supreme Court in Crawford.

XI. The Plaintiffs have Demonstrated the Probability of Success on the Merits

The history of the Wisconsin Supreme Court's effort to carefully preserve the broad constitutional right to vote is particularly clear. The fundamental character of the right in issue is vital to the very existence of our state as a democracy in which political power, whether that be executive, legislative or judicial, is derived from the free consent of the governed. The scope of the impairment has been shown to be serious, extremely broad and largely needless. There is no doubt that the plaintiffs have shown a very substantial likelihood of success on the merits.

XII. The Plaintiffs have Demonstrated a Substantial Probability of Irreparable Harm

The question of irreparable harm poses a difficult question to the court. The defendants have demonstrated the substantial efforts undertaken by the Government Accountability Board to implement the requirement of Act 23. The court is mindful of the potential for difficulty which will ensue if the new requirements are now withdrawn, Purcell v. Gonzalez, 549 U.S. 1, 5 (2006). It remains true and, for this court, dispositive that the new voter identification requirements implements by Act 23 will likely exclude from the election process a significant portion of Wisconsin voters who are qualified under our constitution to participate in this process. The rigid nature of Act 23 requires that, for them, this opportunity be forever lost. Justice William Scalia, in his concurring opinion in Crawford, noted the need to determine, as quickly as practicable, the applicable rules in election law cases so as to assure the validity of the election process, Crawford,

supra, at 207. So too, here. If an injunction issues, the election will go forward and constitutionally qualified voters be not be excluded. Difficulties may ensue but that is because an unconstitutional regulation had been unwisely attempted. If no injunction is issued, a clearly improper impairment of a most vital element of our society will occur. The duty of the court is clear. The case has been made. Irreparable harm is likely to occur in the absence of an injunction..

ORDER

It is the order of the court that the defendant shall cease immediately any effort to enforce or implement the photo identification requirements of 2011 Wisconsin Act 23, pending trial of this case and further order of the court.

By the court this 6th day of March, 2012.

Judge David Flanagan